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BEFORE THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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| In the Matter of:<br><br>ILWU, Alaska Longshore Division,<br>and<br>ILWU, Unit 22,<br>and<br>American President Lines, LTD.,<br>and<br>Samson Tug and Barge, LLC,<br>Intervenor. | Case Nos. 19-CD-225672 and 19-CD 225674 |

**OPPOSITION BY INTERVENOR TO THE ILWU ALASKA LONGSHORE DIVISION AND UNIT 222'S MOTION TO REOPEN THE RECORD**

Intervenor, Samson Tug & Barge LLC, ("Samson"), by and through legal counsel, opposes the motion of the ILWU Alaska Longshore Division and Unit 222 ("ILWU") to reopen the record.

The parties' dispute regarding whether to reopen the record is, unfortunately, much ado about not much. The ILWU seeks to reopen the record in order to introduce a decision by the Alaska Arbitrator (who is himself an ILWU longshoreman) issued on February 11, 2019. The ILWU seeks to introduce this arbitration decision as "highly material evidence" that the All Alaska Longshore Agreement ("AALA"), to which APL and the ILWU are

parties, covers the disputed work. Such a determination by the Alaska Arbitrator should come as no surprise, nor should it be viewed as meaningful in deciding this 10(k) matter.

In this case, unlike most 10(k) cases, the Board is faced with two separate employer/union relationships, each of which has a collective bargaining agreement that applies to the disputed work. Accordingly, a decision in this case will not rest on whether either collective bargaining agreement covers the disputed work – they both do – but how that conflict is resolved based on the other 10(k) factors such as past practice, employer preference, economy and efficiency of operations and relevant skills and training. None of those critical factors is advanced or illuminated in the slightest by the inclusion of the arbitration decision at issue.

The NLRB has consistently held that arbitration decisions which do not include all of the parties to a 10(k) proceeding are of minimal substantive value. *International Union of Elevator Constructors, Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1215 (2007) ("The Board does not give dispositive weight to arbitrator's decisions where the employer is not a party to the proceeding and did not agree to be bound to its results.") Notably in *Kone Inc.,* the Board's use of the term "dispositive weight" did not refer to the entire case but only the single 10(k) factor of "collective bargaining agreements." Thus in that case, an arbitration award in which one of the competing unions did not participate was insufficient to award even that single factor in favor of the union submitting the award.

In their respective briefs on this issue, APL and the ILWU spar over the importance actually given to the arbitration award in *Automotive Trades District Lodge 190 (Sea-Land Service),* 322 NLRB 830, 835 (1997). It should be noted that regardless of the importance

given the award in that case, the situation in this case makes reliance on the arbitration decision put forth by the ILWU even less deserving of substantive weight. In *Sea-Land Services*, there was a single employer who had signed collective bargaining agreements with two separate unions arguably covering the same work. Thus, the employer of both unions was a party to and bound by the arbitration. In this case, the arbitration award at issue is further attenuated from the actual jurisdictional dispute because two employers, each with its own collective bargaining agreement, are involved. Thus the arbitration award the ILWU seeks to introduce did not involve *either* the employer or union of one of the competing collective bargaining agreement. In this scenario, therefore, even less weight should be afforded the proposed arbitration decision.

While such an arbitration decision can be admitted during the hearing given the broad scope of admissible evidence, the limited probative value of such evidence does not warrant reopening the record. This is particularly true where the arbitration decision at issue, as is the case here, is still subject to the parties' appeal process. If the record is reopened to allow the inclusion of the arbitration decision, APL should certainly be allowed to reopen the record to include evidence of the appeal of the arbitration decision and ultimately any subsequent final appeal decisions. Given the limited value of the arbitration decision and the substantial evidence introduced during the parties' three-day hearing, it would be advisable to avoid reopening the record for either party and deciding this matter based on the existing record.

In order to avoid that unnecessary outcome, Samson is willing to stipulate that "on February 11, 2019, the Alaska Arbitrator issued an arbitration award that held that the

disputed work at issue in this 10(k) proceeding was covered by the AALA and that neither Samson nor MEBA/IBU were parties to the arbitration or agreed to be bound by the outcome." Agreeing to a stipulation of this nature permits the ILWU to claim its intended benefit from the arbitration award (*i.e.* that the Alaska Arbitrator has held the AALA covers the disputed work) while avoiding introducing into the record any extraneous analysis or arguments stemming from the arbitration decision. Moreover, it avoids the necessity of reopening the record to involve APL's appeal evidence.

The three days of hearing and dozens of exhibits already populate the record of this case. The deciding 10(k) factors are already sufficiently included in the record and have been briefed by the parties. Accordingly, the ILWU's Motion to Reopen the Record should be denied.

DATED this 18th day of March, 2019, at Anchorage, Alaska.

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## CERTIFICATE OF TYPEFACE AND SERVICE

Pursuant to NLRB Rules and Regulations, Part 102, this certifies that 12-point or larger, proportionally spaced Times New Roman typeface was used in this document.

I further certify that on March 18th, 2019, a true and correct copy of the foregoing was sent to:

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